Citation: Costello v. The Co-operators General Insurance Company, 2021 ONLAT 19-013272/AABS

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In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

James Costello

Applicant

and

The Co-operators General Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avril A. Farlam, Vice Chair**

APPEARANCES:

For the Applicant: Alex Nikolaev
Counsel

For the Respondent: Nathalie V. Rosenthall and Nathan M. Fabiano
Counsel

HEARD By Way of Written Submissions

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] James Costello ("applicant") was involved in an automobile accident on April 10, 2019 ("accident"), and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). [1] The applicant was 24 years old at the time of the accident.

[2] The Co-operators General Insurance Company ("respondent") determined that the applicant's injuries fit the definition of "minor injury" prescribed by s. 3 (1) of the *Schedule* and therefore fall within the Minor Injury Guideline ("MIG").[2] The respondent paid some benefits but the applicant's remaining available MIG limit was $1,220.23 on May 20, 2020. The respondent denied other benefits to the applicant including income replacement benefit ("IRB") of $67.17 per week from November 12, 2019 to March 1, 2020.

[3] The applicant disagreed and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal).

PRELIMINARY ISSUE – RESPONDENT'S OBJECTION TO APPLICANT'S REPLY

[4] The respondent submits that I should not consider the applicant's MRI and the alleged Ativan prescription as this evidence was introduced by the applicant in reply and well after the production deadline.

[5] The applicant submits that the MRI of his left wrist dated September 21, 2020 is clearly relevant to the issues in dispute as it shows an objective injury to an area of the body that the applicant complained about shortly after the accident and there is no prejudice to the respondent if it forms part of the medical record. The applicant also submits that prescription for Ativan is mentioned in paragraphs 12 and 13 of his initial submissions and the prescription dated July 9, 2020 by CMP is at tab 12, page 1 of his initial submissions.

[6] I decline the respondent's request to not consider the MRI and Ativan prescription in the applicant's reply submissions. Rule 3.1 of the Licence Appeal Tribunal, Animal Care Review Board, Fire Safety Commission Common Rules of Practice & Procedure, October 2, 2017, ("Tribunal's Rules") allows me to waive or vary the Tribunal's Rules to facilitate a fair, open and accessible process and

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[1] O.Reg. 34/10

[2] Minor Injury Guideline, Superintendent's Guideline 01/14, issued under s. 268.3 (1.1) of the Insurance Act.

to allow effective participation by the parties and also to ensure efficient, proportional and timely resolution of the merits of the proceeding. After reviewing all the submissions and the post-submission correspondence of both parties, it is clear that the applicant made an effort to respond to the respondent's submissions and although some new material was raised, it appears relevant and does not materially prejudice the respondent.

ISSUES

[7] The issues to be decided are:

i. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 limit and in the MIG?

ii. Is the applicant entitled to an IRB in the weekly amount of $67.17 per week from November 12, 2019 to March 1, 2020?

iii. Is the applicant entitled to $1,301.00 for physiotherapy services recommended by Jamikkumar Mehta, in a treatment plan (OCF-18) submitted July 25, 2019 and denied by the respondent August 8, 2019?[3]

iv. Is the applicant entitled to $346.02 for physiotherapy services recommended by Alpha Physio and Rehab Milton in a treatment plan (OCF-18) submitted August 29, 2019 and denied by the respondent August 29, 2019?[4]

v. Is the applicant entitled to $115.00 for other good and services recommended in a treatment plan (OCF-18) submitted on May 27, 2019 and denied by the respondent June 26, 2019?[5]

vi. Is the applicant entitled to $4,658.00 for physiotherapy services recommended by Alpha Physio and Rehab Milton in a treatment plan (OCF-18) submitted February 25, 2020 and denied by the respondent February 25, 2020?

vii. Is the applicant entitled to $3,441.34 for physiotherapy services recommended by Alpha Physio and Rehab Milton in a treatment plan

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[3] Withdrawn at the hearing, Applicant's submissions October 19, 2020, para 3(a).
[4] Withdrawn at the hearing, Applicant's submissions October 19, 2020, para 3(b).
[5] Withdrawn at the hearing, Applicant's submissions October 19, 2020, para 3(c).

(OCF-18) submitted on January 22, 2020 and denied by the respondent February 5, 2020?

viii. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?[6]

ix. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[8] The applicant sustained minor injuries as defined under the *Schedule* and is subject to the $3,500.00 funding limit. The applicant is not entitled to an IRB as claimed. The applicant is entitled to the physiotherapy in the two disputed treatment plans up to the MIG limit of $3,500.00, less all amounts already paid by the respondent for treatment, together with interest on any amount owing up to the MIG limit of $3,500.00.

LAW

[9] The MIG establishes a treatment framework available to an injured person who sustains a "minor injury" as a result of an accident. A "minor injury" is defined in s. 3(1) of the *Schedule* as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury". Under s. 18(1) of the Schedule, injuries that are defined as a "minor injury" are subject to a $3,500.00 funding limit on treatment.

[10] To be eligible for treatment above the $3,500.00 funding limit, the applicant must establish that his or her impairments sustained in the accident are not predominantly minor, or produce compelling evidence, provided by a health practitioner, that was documented before the accident, that the applicant has a pre-existing condition that will prevent the applicant from achieving maximal recovery from the minor injury if subject to the funding limit.

[11] The onus is on the applicant to establish, on a balance of probabilities, that his or her injuries fall outside of the MIG.[7]

[12] An employed person's entitlement to an IRB falls under s. 5(1)(1)(i) of the *Schedule*: an IRB is payable if the insured was working at the time of the accident and, within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment. If the insured was working at

[6] Withdrawn at the hearing, Applicant's submissions October 19, 2020, para 3(f).
[7] *Scarlett v. Belair,* 2015 ONSC 3635 (Div. Ct.) para 24.

the time of the accident, this inquiry is divided into two steps: 1) what are the essential tasks of employment; and, 2) is the insured substantially unable to perform the essential tasks of that employment? After 104 weeks post-accident the test for eligibility for IRB changes.

[13] The onus is on the applicant to establish entitlement to IRB on a balance of probabilities.

[14] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident. The applicant has the onus of proving on a balance of probabilities that the benefits he or she seeks are reasonable and necessary.

[15] The onus is on the applicant to establish entitlement on a balance of probabilities.

ANALYSIS

Did the Applicant Suffer Injuries That Are Predominantly Minor?

[16] The applicant submits that his injuries are not minor and that he suffers from pre-existing back problem, psychological injury or sequelae and chronic pain as a result of the accident and requires further treatment taking him outside the MIG.

[17] I find that the applicant's physical injuries from the accident are predominantly minor injuries because none of the applicant's medical evidence indicates he predominantly suffered soft tissue injuries in the accident. On the day of the accident, the applicant was diagnosed with musculoskeletal pain at the hospital. X-rays of the applicant's lumbar and cervical spine taken a few days later came back unremarkable. On April 12, 2019 Dr. Peiris, applicant's family physician, noted lower and mid back, neck and right shoulder pain and a forearm bruise. Later in April 2019, Dr. Peiris diagnosed whiplash injury and also noted shoulder and lower back pain and a new complaint re wrist click and mild local swelling on right wrist. Continuation of physiotherapy was recommended.

[18] May 1, 2019 bilateral wrist imaging showed no significant abnormality. In the applicant's reply submissions, for the first time, September 21, 2020 imaging of the applicant's left wrist was put forward by the applicant. This 2020 imaging revealed a "small tear" involving the triangular fibrocartilage. The applicant submits that this resulted from the accident and is not a minor injury. The respondent did not have an opportunity to respond to this submission because it was raised in reply.

[19] I disagree with the applicant that the 2020 imaging of the applicant's *left* wrist reveals a non-minor injury arising from the accident. Firstly, Dr. Peiris noted only mild local swelling on the applicant's *right* wrist shortly after the accident.

Secondly, Dr. Peiris ordered imaging of both wrists and the May 1, 2019 imaging showed no significant abnormality. Thirdly, the September 2020 imaging report of the applicant's *left* wrist from a different imaging facility notes that "no previous CT or MRI is available for comparison" which is not the case. This undermines the reliability of the conclusion in the 2020 imaging report which was done some 17 months post-accident. In the 17 months since the accident the applicant had fractured a finger on his right hand while changing his car tires and subsequently complained of pain in his left wrist. Finally, the 2020 imaging reports a "small tear within the triangular fibrocartilage…a subtle oblique tear…" which is insufficient to take the applicant out of the MIG even if the applicant had been able to establish that this injury resulted from the accident which I find that he has not.

[20] Dr. Getahun, applicant's orthopaedic surgeon, assessed the applicant in June 2020 and concluded that the applicant's left wrist injury and a derangement of the left sternoclavicular joint that prevented him from achieving maximum medical recovery within the MIG. For the reasons set out above, Dr. Getahun's conclusion that the applicant's left wrist injury was as a result of the accident is not persuasive. There is no significant medical support for the finding that derangement of the left sternoclavicular joint is caused by the accident. As a result, I give Dr. Getahun's opinion little weight.

[21] There is insufficient medical evidence before me that establishes the applicant suffered anything other than sprain and strain type physical injuries from the accident. These fall within the definition of "minor injury". However, the applicant submits that he suffers from pre-existing back problem and chronic pain that remove him from the MIG.

Does the applicant have a pre-existing back problem, psychological injury or chronic pain as a result of the accident?

[22] I find that the applicant has not provided sufficient evidence to meet his burden of proof that he has a pre-existing back problem exacerbated by the accident or that he suffers from psychological injury or chronic pain justifying treatment beyond the MIG.

[23] I find the applicant did not have a pre-existing back problem prior to the accident. Although there is some complaint of back pain in the records of Dr. Pieris, the applicant did not complain to Dr. Pieris about back pain in the eight months before the accident despite the fact that he was working at that time in employment that required him to engage his back. This is corroborated by the applicant's post-accident self-reports to Dr. Zabieuliausaks, respondent's physiatrist, that he was in excellent health prior to the accident and to Dr. Getahun that he had no significant pre-accident injuries. The applicant submits he was prescribed pain medication on February 3, 2018 but there is no clinical record put forward explaining the need for this.

[24] I find that the applicant did not suffer psychological injury as a result of the accident. Although the applicant submits that he was prescribed anti-anxiety medication after the accident, he has put forward no medical evidence of a psychological diagnosis as a result of the accident.

[25] I find that the applicant does not have chronic pain. When Dr. Getahun assessed the applicant in June 2020, Dr. Getahun did not mention chronic pain or recommend that the applicant see a pain specialist.

[26] Dr. Pieris referred the applicant to Dr. Hawass for a pain assessment. Dr. Hawass on July 9, 2020 diagnosed "musculoskeletal lower back pain" and recommended medication including injections but did not diagnose chronic pain syndrome. Functionally, the applicant was able to return to work post-accident for some time, he drives, he is able to exercise at home and he has returned to most of his daily activities.

[27] Considering the totality of the evidence, I find that the applicant has not proven on a balance of probabilities that he had a pre-existing back problem, psychological injury or chronic pain as a result of the accident that justifies treatment beyond the limits of the MIG. The burden of bringing forward persuasive medical evidence of his alleged conditions is on the applicant and he has not done so.

Is the Applicant Entitled to IRB of $67.17 per week from November 12, 2019 to March 1, 2020 as claimed?

[28] The applicant says he stopped working after the accident because of the injuries he sustained and claims $67.17 per week from November 12, 2019 to March 1, 2020, a period less than 104 weeks post-accident.

[29] At the time of the accident the applicant was employed as a station attendant for a major Canadian airline. This employment required the applicant to assist baggage agents in the loading and unloading of baggage, cargo and cabin functions and related paperwork. The applicant underwent a work hardening program and returned to work full-time some six months post-accident until November 27, 2019. It is clear from the evidence that the essential tasks of the applicant's employment involve relatively heavy physical work.

Does the applicant suffer a substantial inability to complete the essential employment tasks?

[30] I find that the applicant is not eligible for IRB based on a lack of medical evidence establishing he has substantial inability to complete the essential tasks of his pre-accident employment.

[31] The April 13, 2019 OCF-3, disability certificate by the applicant's physiotherapist Mr. Mehta states that the anticipated duration of disability is nine to twelve weeks. This time period expired before the applicant returned to work in the fall of 2019.

[32] The records of Dr. Pieris note the applicant's return to work and show that the applicant received some medical advice from Dr. Pieris about this. Dr. Pieris did not restrict the applicant's return to work at his pre-accident employment.

[33] Dr. Getahun assessed the applicant in June 2020 with respect to the MIG and IRB. As discussed above, I have given Dr. Getahun's opinion little weight on the issue of whether the applicant's injuries from the accident are within the MIG and I do so again with respect to IRB entitlement for the following reasons.

[34] Dr. Getahun's opinion is that the applicant suffers a substantial inability to perform the essential tasks of his pre-accident employment and his lumbar spine, left upper extremity and cervical spine injuries and resultant impairments preclude him from performing the required lifting, carrying, bending and twisting. This assessment took place some 14 months post-accident. Although Dr. Getahun relies on the information stated in his report that the applicant was not working in June 2020, he does not appear to be aware that the applicant stopped working in March 2020 due to COVID-19. Dr. Getahun does not specifically opine on whether the applicant could have worked for the period in question. Further Dr. Getahun does not appear to be aware that two of the major complaints made by the applicant during his assessment were not accident-related, specifically his left wrist and his left clavicle. The applicant had injured his left clavicle while exercising at home as noted in the records of Holly Medical Clinic.

[35] I prefer the opinion in the report by Dr. Zabieliauskas who assessed the applicant October 24, 2019. This report is closer in time to the accident and to the period in dispute than Dr. Getahun's report. Dr. Zabieliauskas indicates in his report that the applicant did not express any signs of discomfort during the examination. Dr. Zabieliauskas diagnosed cervical strain, WAD-II, right wrist strain and thoracolumbar strain. Dr. Zabieliauskas found that there were no residual accident-related impairments and specifically opined that the applicant "…is safe to resume all aspects of his life including working as a station attendant for Air Canada…gradual return to work is always optimal, 3 days for 2 weeks, 4 days for 2 weeks and then full-time." Dr. Zabieliauskas also has experience as a rehabilitation consultant for Air Canada and had reviewed the OCF-2 dated May 1, 2019 as part of his report. The applicant argues that Dr. Zabieliauskas did not review the records of Dr. Pieris. However, I do not see this as a significant flaw as Dr. Pieris did not restrict the applicant's return to work at his pre-accident employment.

[36] Taken as a whole, the weight of the medical evidence fails to establish that the applicant meets the eligibility test for IRB. Even if there may be some tasks of his employment that the applicant might not be able to return to, I find that the applicant does not suffer from a substantial inability to perform the essential tasks of his pre-accident employment. The onus of proof is on the applicant and I find that he has failed to meet it.

Is the Applicant Entitled to $4,658.00 and $3,441.34 for Physiotherapy Services?

[37] I find the applicant is entitled to these two disputed treatment plans because they are reasonable and necessary. Dr. Peiris has consistently recommended that the applicant have physiotherapy since the date of the accident. The applicant reported significant improvement in his condition according to the treatment plans and treatment records provided. The goals, progress achieved and cost appear reasonable despite the respondent's arguments to the contrary. Both treatment plans were proposed within ten months post-accident.

[38] Given that I have already found the applicant's injuries to be treatable within the MIG, the monetary amount the applicant is entitled to is the MIG limit of $3,500.00, less all amounts already paid by the respondent for treatment, together with interest on any amount owing up to the MIG limit of $3,500.00.

Interest

[39] Interest is payable in accordance with s. 51 of the *Schedule* on any amount owing up to the MIG limit of $3,500.00.

Respondent's Request for Costs

[40] The respondent requests costs of this hearing in it's November 1, 2020 submissions.

[41] I decline to add this as an issue or to determine it. The respondent's request for costs is not an issue before me. The Tribunal's May 20, 2020 Order sets out the issues that both parties agreed should be decided at this hearing. None of the listed issues include a claim for costs by the respondent. The respondent could have sought an Order prior to this hearing to add this but did not do so.

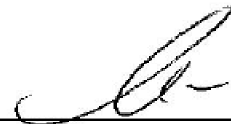
[42] Even if the respondent's request for costs had been an issue before me, I would not have granted costs. I am not satisfied that the applicant's conduct, even considering the content of his reply submissions, has risen to the level of acting unreasonably, frivolously, vexatiously or in bad faith as required by Rule 19 of the

Safety, Licencing Appeals & Standards Tribunal Ontario Common Rules of Practice & Procedure, October 2, 2017.

ORDER

[43] For the above reasons, I find that the applicant sustained minor injuries as defined under the *Schedule* and is subject to the $3,500.00 funding limit. The applicant is not entitled to an IRB as claimed. The applicant is entitled to the physiotherapy in the two disputed treatment plans up to the MIG limit of $3,500.00, less all amounts already paid by the respondent for treatment, together with interest on any amount owing up to the MIG limit of $3,500.00.

Released: February 23, 2021



Avril A. Farlam, Vice Chair